Supreme Court, U.S.
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In The

Supreme Court of the United States

INTERMOUNTAIN SPORTS, INC.,

Petitioner,

vs.

UTAH DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Utah Court Of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Do the condemnation laws of this land allow the government to destroy (take) a real property owner's business without just compensation for economic business loss merely because the land underneath the business was not actually taken?

II. Should a state's constitution or its narrow interpretation of condemnation laws block a property owner's entry to the courts when there is a provable nexus between a taking and a business loss?

III. Do state constitutions and existing condemnation laws sufficiently and uniformly protect property owners' economic business rights in accordance with the Equal Protection Clause and the Fifth Amendment of the United States Constitution?

CORPORATE DISCLOSURE

Petitioner is Intermountain Sports, Inc., a Utah Corporation. There are no parent corporations or publicly held companies owning 10% or more of Petitioner's stock.

TABLE OF CONTENTS

	Page
Questions Presented	i
Corporate Disclosure	ii
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional Provisions	1
Statement of the Case	2
Argument	5
I. The Utah Department Of Transportation Violated Petitioner's Constitutional Rights By Taking Its Private Property Without Just Compensation	5
II. UDOT Violated Utah Law By Substantially Interfering With Petitioner's Property	6
III. Justice And Fairness Demand That Takings Case Law In This Country Be Uniformly Expanded To Protect A Private Property Owner's Business Interests And Allow Access To The Courts When A Nexus Between A Taking And A Business Loss Can Be Clearly Established	7
Conclusion	10

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Armstrong v. United States, 364 U.S. 40, 80 S.Ct. 1563, 4 L.Ed.2d 1554 (1960) 5

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987) 8

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982) 6

Penn Central Transportation Company v. City of New York, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) 5

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922) 6

UTAH COURT DECISIONS:

McGrew v. Industrial Commission, 85 P.2d 608 (Utah 1938) 8

Strawberry Elec. Service Dist. v. Spanish Fork City, 918 P.2d 870 (Utah 1996) 7

View Condominium Owners Ass'n v. MSICO, L.L.C., 90 P.3d 1042 (UT App. 2004) 7

CONSTITUTIONAL PROVISIONS:

United States Constitution Amendment V 1, 5

United States Constitution Amendment XIV 2, 5

Utah Constitution, Article I, Section 22 ..... 2, 5

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The February 16, 2005 denial of certiorari by the Utah Supreme Court is unreported. The opinion of the Utah Court of Appeals is reported at 103 P.3d 716 (UT App. 2004). The Order on Motions for Judgment on the Pleadings of the Utah Third District Court is unreported.

JURISDICTION

The Utah Court of Appeals entered judgment on November 12, 2004. Petitioner filed a timely petition for a writ of certiorari in the Utah Supreme Court, which that Court denied on February 16, 2005. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

United States Constitution Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; **nor shall private property be taken for public use, without just compensation.** (Emphasis added.)

United States Constitution Amendment XIV:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Constitution, Article I, § 22:

> Private property shall not be taken or damaged for public use without just compensation.

STATEMENT OF THE CASE

For more than 15 years, Petitioner owned a parcel of land and operated a successful recreational vehicle ("RV") sales business near the 4500 South off-ramp of Interstate 15 ("I-15") in Murray, Utah. The unique location of Petitioner's RV business near the off-ramp of one of Utah's busiest freeways was instrumental to Petitioner's success.

Not only was Petitioner's business signage and RV inventory plainly visible to every driver and vehicle passenger along this well-traveled corridor, but customers and potential buyers could easily and conveniently realize their recreational dreams by slipping off the freeway to meet with a professional salesperson in Petitioner's showroom within minutes. Such easy access and convenient location is a proven business asset in the RV industry.

In July 1997, the Utah Department of Transportation ("UDOT") closed the 4500 South off-ramp as part of an extensive freeway reconstruction project. For a period of 18 months, access to Petitioner's business from the 4500 South off-ramp was completely closed. For an additional 29 months, UDOT placed periodic closures on traffic at the 4500 South off-ramp.

For almost four years, Petitioner's customers and potential buyers were re-routed to Petitioner's business (and forced to find their way without directional signage) along a circuitous and confusing 2.5 mile loop. The net impact on Petitioner was that traffic flow in the area of 4500 South dropped two-thirds from traffic flow during the years prior to reconstruction, and Petitioner was effectively run out of business.

In 2002, Petitioner filed a complaint against UDOT alleging, *inter alia*, that UDOT had taken Petitioner's property by inverse condemnation in violation of the Utah Constitution. The trial court granted UDOT's motion for judgment on the pleadings and dismissed Petitioner's inverse condemnation claim because "temporary denial of access to property does not constitute a taking." The Utah Court of Appeals affirmed on the basis that "Intermountain does not have a protectable property interest in an 'easement of access' to I-15 or 4500 South."

The relevant "takings" issue before the trial court and the Utah Court of Appeals was not whether Petitioner was denied physical access to its property, but rather whether UDOT substantially impaired Petitioner's legal right to use its land for the operation of a commercial business.

Similarly, the issue before this Court is whether governmental destruction of a private property owner's

business is a compensable taking under state and federal law.

The facts material to consideration of this question are:

1. Petitioner owned a parcel of land and operated an RV sales business at 4225 South 500 West in Murray, Utah contiguous to the freeway and near the 4500 South off-ramp on Interstate 15. (R. 2-3)

2. For almost four years, from July 1997 to May 2001, UDOT conducted a massive reconstruction of the I-15 freeway in order to benefit the people of Utah and prepare for the 2002 Winter Olympics. (R. 5)

3. In July 1997, UDOT closed the 4500 South off-ramp adjacent to Petitioner's RV business, as well as the streets for east and west traffic adjacent to the off-ramp. (R. 5)

4. For a period of 18 months, from July 1997 through December 1998, access to Petitioner's RV business from the 4500 South off-ramp was completely closed. (R. 5)

5. For an additional 29 months, from January 1999 through May 2001, UDOT placed periodic closures on traffic at the 4500 South off-ramp. (R. 5)

6. Instead of direct access off the 4500 South off-ramp, Petitioner was left with a circuitous, 2.5 mile loop to its business that snaked behind and around the area, thereby confusing, frustrating, and ultimately eliminating Petitioner's potential customers. (R. 5-6)

7. The net impact on Petitioner from UDOT's I-15 reconstruction was that traffic flow on I-15 in the area of

4500 South dropped two-thirds from traffic flow of 15 years prior to reconstruction. (R. 6)

8. As a direct provable result of UDOT's reconstruction of I-15, Petitioner suffered sales losses in excess of $2,000,000, including the ultimate total loss of his business. (R. 6, 9)

ARGUMENT

I. The Utah Department Of Transportation Violated Petitioner's Constitutional Rights By Taking Its Private Property Without Just Compensation.

The Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, and Article I, § 22 of the Utah Constitution prohibit the government from taking private property for public use without just compensation. The purpose of this bar is to prevent government from "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

As this Court noted in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), the question of what constitutes a "taking" is a problem of considerable difficulty:

> This Court, quite simply, has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Indeed,

> we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses **proximately caused** by it depends largely "upon the particular circumstances [in that] case." *Id.* at 124 (citations omitted) (emphasis added).

Modern takings case law has developed in two distinct categories – physical takings and regulatory takings. A "physical" taking occurs when the government requires a landowner to submit to the physical occupation of his or her land. *See e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). A "regulatory" taking occurs when the government regulates the use of property to the extent of depriving an owner of the economic use of its property. *See e.g., Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922). Every trial lawyer in Utah opines that Utah courts will dismiss a takings case if it does not fit in one of these categories.

UDOT effectively destroyed Petitioner's private property during the I-15 reconstruction project. However, because Petitioner's takings claim fits cleanly into neither established category, UDOT has thus far successfully blocked Petitioner's entry into the trial system to establish the "nexus" or proximate cause of its losses. As a result, UDOT has forced Petitioner to bear a public burden "which, in all fairness and justice, should be borne by the public as a whole."

II. UDOT Violated Utah Law By Substantially Interfering With Petitioner's Property.

A taking is "any substantial interference with private property which destroys or materially lessens its value, or

by which the owner's right to its use and enjoyment is in any substantial degree abridged or destroyed." *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 877 (Utah 1996) (quotations and citations omitted). Under Utah law, the takings analysis has two principal steps. First a claimant must demonstrate some protectable interest in property. If a claimant possesses a protectable property interest, the claimant must then show that the interest has been taken or damaged by government action. *View Condo. Owners Ass'n v. MSICO, L.L.C.*, 90 P.3d 1042, 1051 (UT App. 2004).

In the present case, Petitioner had the legal right to use its land for the operation of a commercial business. The RV business Petitioner established on its private property was, therefore, a protectable property interest. Without ever setting foot on Petitioner's land, UDOT substantially interfered with Petitioner's property rights and caused significant economic injury that is not presently recognized by Utah courts.

Petitioner's economic business loss (as well as Petitioner's ultimate loss of the business) rises to the level of a constitutionally prohibited "taking," thereby entitling Petitioner to just compensation under Utah law.

III. Justice And Fairness Demand That Takings Case Law In This Country Be Uniformly Expanded To Protect A Private Property Owner's Business Interests And Allow Access To The Courts When A Nexus Between A Taking And A Business Loss Can Be Clearly Established.

A typical taking occurs when the government formally acts to condemn property in the exercise of its power of

eminent domain. The word "property" is commonly understood to mean a physical thing – such as a tract of land. However, in the legal sense, "property" means legal rights (i.e., the right of any person to possess, use, enjoy and dispose of a thing).

In *McGrew v. Industrial Commission,* 85 P.2d 608 (Utah 1938), the Utah Supreme Court described the "broad and true meaning of property" as follows:

> The words 'life,' 'liberty,' and 'property' are constitutional terms, and are to be taken in their broadest sense. They indicate the three great subdivisions of all civil right. The term 'property,' in this clause, embraces all valuable interests which a man may possess *outside of himself*; that is to say, outside of his life and liberty. It is not confined to mere tangible property but extends to every species of vested right. *Id.* at 610 (emphasis in the original) (citations omitted).

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 482 U.S. 304 (1987), this Court noted that the Just Compensation Clause of the Fifth Amendment does not prohibit governmental interference with property rights *per se*, but instead places a condition on the exercise of that power (i.e., secures compensation for the property owner in the event that an otherwise proper interference amounts to a taking). Quoting *Pumpelly v. Green Bay Co.*, 13 Wall. 166, 177-178, 20 L.Ed. 557 (1872), this Court also noted:

> It would be a very curious and unsatisfactory result, if . . . it shall be held that if the government refrains from the absolute conversion of real property to the uses of the public it can destroy its value entirely, *can inflict irreparable and*

> *permanent injury to any extent, can, in effect, subject it to total destruction without making any compensation*, because, in the narrowest sense of that word, it is not taken for the public use. *Id.* at 316-317 (emphasis added).

Likewise, it would be a "very curious and unsatisfactory result" if government could inflict permanent economic injury to a private property owner's business just because land is not actually occupied or removed and government regulations are not implicated.

When a private property owner can establish a nexus (proximate cause) between an economic business loss and a governmental taking, as is the case with Petitioner, that property owner should at least be entitled to a trial to prove his case under scrutiny of cross examination and, if merited, to just compensation under state and federal constitutional law. At a minimum, an injured property owner is entitled to meaningful entry into the trial system which in Utah, and numerous other states across this country, is not the case today.

Accordingly, current state and federal takings case law should be uniformly expanded to protect private property owners' business interests and provide injured owners with a potential judicial remedy when their property is damaged or destroyed through governmental action for the public good.

CONCLUSION

John Ashby and his family worked their entire life to establish a business that was taken by the State without a dime of compensation. The RV business Mr. Ashby established on his private property was a protectable property interest, and that property was effectively taken by UDOT without compensation during the I-15 reconstruction project. UDOT's actions caused Mr. Ashby direct injury and a consequent devaluation of his commercial property. Justice and fairness require that Mr. Ashby's economic injuries be borne by the public as a whole and not by the Ashby family, alone.

Courts throughout this land should give injured property owners like Petitioner a "fighting chance" to prove their case in a court of law as contemplated by the founding fathers of this great country. Accordingly, this petition for a writ of certiorari should be granted.

RESPECTFULLY SUBMITTED this 13 day of May, 2005.

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App. 1

Court of Appeals of Utah.

INTERMOUNTAIN SPORTS, INC.,
Plaintiff and Appellant,

v.

DEPARTMENT OF TRANSPORTATION and
Murray City, Defendants and Appellees.

No. 20031029-CA

November 12, 2004

B. Ray Zoll, Murray, and John Martinez, Salt Lake City, for Appellant

Mark L. Shurtleff and Randy S. Hunter, Salt Lake City, for Appellees

Before BILLINGS, P.J., and DAVIS and GREENWOOD, JJ.

OPINION

BILLINGS, Presiding Judge:

Intermountain Sports, Inc. (Intermountain) appeals the trial court's grant of Utah Department of Transportation's (UDOT) motion for judgment on the pleadings pursuant to rule 12(c) of the Utah Rules of Civil Procedure. Intermountain argues that the trial court erred by granting UDOT's motion because Intermountain has alleged facts sufficient for both its inverse condemnation and its uniform operation of laws claims. We affirm.

BACKGROUND

Intermountain owned and operated a recreational vehicle sales business located at 4225 South 500 West in

Murray, Utah, near the 4500 South off-ramp from Interstate 15 (I-15). Intermountain's business was accessible only from 500 West and not directly accessible from either I-15 or 4500 South.

From approximately July 1997 to May 2001, UDOT conducted a massive reconstruction of I-15 (I-15 reconstruction). During the I-15 reconstruction, UDOT periodically closed both the 4500 South off-ramp and 4500 South to eastbound and westbound traffic. However, UDOT did not perform work on 500 West, block or disrupt traffic on 500 West, or block direct access to Intermountain's business premises on 500 West.

Intermountain filed a complaint alleging six causes of action against UDOT, two of which are relevant to this appeal. First, Intermountain alleged that the I-15 reconstruction, and specifically, the closure of the 4500 South off-ramp and 4500 South, blocked Intermountain's "easement of access" to its business premises and that this constituted a "taking" under the Takings Clause of the Utah Constitution. In particular, Intermountain asserted that by "taking" its "easement of access," UDOT (1) "substantially and materially impaired [Intermountain's] right of access to the I-15 off-ramp at 4500 South and to 4500 South Street as well as [Intermountain's] customers' right of access to 4500 South Street and [Intermountain]"; (2) substantially diminished the value of Intermountain's property; and (3) damaged Intermountain's private property interest for a public use without just compensation.

Second, Intermountain alleged that access from I-15 to its property during the I-15 reconstruction involved a circuitous 2.5-mile loop making it difficult for potential customers driving on I-15 to reach Intermountain. Intermountain

claimed that UDOT constructed this circuitous loop so that other businesses received the benefit of direct access to 4500 South off-ramp traffic and that UDOT refused to offer Intermountain a similar benefit, which violated the Utah Constitution's Uniform Operation of Laws provision.

UDOT filed a motion for judgment on the pleadings pursuant to rule 12 (c) of the Utah Rules of Civil Procedure. The trial court granted the motion ruling that Intermountain failed to state a claim for either inverse condemnation or violation of uniform operation of laws. Intermountain appeals.

ISSUES AND STANDARD OF REVIEW

Intermountain argues that the trial court erred by granting UDOT's motion for judgment on the pleadings. "When reviewing a grant of a motion for judgment on the pleadings, this court accepts the factual allegations in the complaint as true; we then consider such allegations 'and all reasonable inferences drawn therefrom in a light most favorable to the plaintiff.'" *Arndt v. First Interstate Bank of Utah, N.A.*, 1999 UT 91, ¶ 2, 991 P.2d 584 (citation omitted). "'[W]e affirm the grant of such motion only if, as a matter of law, the plaintiff could not recover under the facts alleged.'" *Id.* (alteration in original) (citation omitted).

ANALYSIS

I. Inverse Condemnation

Article I, section 22 of the Utah Constitution provides, "Private property shall not be taken or damaged for public use without just compensation." Utah Const. art. I, § 22.

"Under Utah law, 'the takings analysis has two principal steps. First, the claimant must demonstrate some protect[a]ble interest in property. If the claimant possesses a protect[a]ble property interest, the claimant must then show that the interest has been taken or damaged by government action.'" *View Condo. Owners Ass'n v. MSICO, L.L.C.*, 2004 UT App 104, ¶ 35, 90 P.3d 1042 (quoting *Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 877 (Utah 1996)). Thus, in order to state an inverse condemnation claim, Intermountain must allege in its complaint a protectable property interest that has been taken or damaged by UDOT.

Intermountain's complaint repeatedly characterizes its relevant property interest as an "easement of access . . . to the I-15 southbound off-ramp to 4500 South and to 4500 South Street." We agree with the trial court that temporary denial of access to property does not constitute a taking. *See Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459, 465 (Utah 1989) ("[T]he mere interference with access to an owner's premises [is] not a 'damaging' or 'taking' within the meaning of article I, section 22 of Utah's constitution.").

In both Intermountain's memorandum in opposition to UDOT's motion for judgment on the pleadings and in its briefs on appeal, Intermountain asserts that its protectable property interest is the right to use its land for a commercial enterprise.[1] Regardless of how Intermountain

[1] Even if we were to accept Intermountain's characterization of its property interest, it does not help Intermountain. Intermountain's unilateral expectation of future business falls short of the types of contractual property rights which our supreme court has described as protected. *See Bagford v. Ephraim City*, 904 P.2d 1095, 1099 (Utah

(Continued on following page)

characterizes its complaint, what Intermountain is claiming is the right to a particular route of ingress and egress to and from Intermountain and the right to have traffic flow in some particular pattern past its premises. It is well established that while property owners have a right of *reasonable access* to and from their property, that right does not include the right to travel in any particular direction from one's property or upon any particular part of the public highway right-of-way. . . . Nor does the right of ingress and egress to or from one's property include any right in and to existing traffic on the highway, or any right to have such traffic pass by one's abutting property. *State v. Harvey Real Estate,* 2002 UT 107, ¶ 14, 57 P.3d 1088 (alteration in original) (quotations and citations omitted); *see also Utah State Road Comm'n v. Miya,* 526 P.2d 926, 928 (Utah 1974) (holding that while the rights of access, light, and air are easements appurtenant to the land of an abutting owner on a street, there is "no property right to a free and unrestricted flow of traffic past [a property owner's] premises, and any impairment or interference with this flow does not entitle the owner to compensation");

1995). In *Bagford,* the court ruled that the plaintiffs' loss of business from competition with Ephraim City's municipal garbage collection was not property within the meaning of the Utah Constitution's Takings Clause. *See id.* The court stated,

> to create a protectable property interest, a contract must establish rights more substantial in nature than a mere unilateral expectation of continued rights or benefits. . . . Thus, a contract that is terminable at the will of either party does not by itself give rise to a protectable property interest because the mere expectation of benefits under such a contract does not give the promisor a legally enforceable right against a promisee to provide future service and therefore does not by itself provide a basis for compensation for loss of future business. *Id.*

Hampton v. State Road Comm'n, 21 Utah 2d 342, 445 P.2d 708, 711 (1968) (holding that a property owner's right of ingress and egress to and from his property and the abutting public highway does not "include any right in and to existing public traffic on the highway, or any right to have such traffic pass by one's abutting property"); *State Road Comm'n v. Rozzelle*, 101 Utah 464, 120 P.2d 276, 277 (1941) (McDonough, J., concurring) ("[D]iminution in value of the realty caused by the loss of the flow of traffic to or past defendant's place of business is not compensable.").

While "[t]he kinds of property subject to the [eminent domain] right . . . [are] practically unlimited," *Farmers New World Life Ins. Co. v. Bountiful City*, 803 P.2d 1241, 1244 (Utah 1990) (second, third, and fourth alterations in original) (quotations and citation omitted), we are unwilling to adopt the view that a business has a protectable property interest in the mere hope of future sales from passing traffic or that the rerouting of traffic constitutes a compensable taking under article I, section 22 of the Utah Constitution. *See Strawberry Elec. Serv. Dist. v. Spanish Fork City*, 918 P.2d 870, 878 (Utah 1996) ("[T]o create a protect[a]ble property interest, a contract must establish rights more substantial than a unilateral expectation of continued privileges.").

Intermountain does not allege that UDOT performed reconstruction work on 500 West, blocked or disrupted traffic on 500 West, or blocked direct access to its business from 500 West. Because Intermountain does not have a protectable property interest in an "easement of access" to I-15 or 4500 South and because Intermountain was accessible from 500 West during the I-15 reconstruction, Intermountain has not stated an inverse condemnation claim.

Therefore, we hold that Intermountain has failed to state a claim for inverse condemnation.

II. Uniform Operation of Laws

Intermountain argues that the trial court erred by dismissing its denial of uniform operation of laws claim. UDOT argues that Intermountain's complaint fails because (1) the uniform operation of laws clause is not a self-executing constitutional provision, and (2) even if the complaint properly stated a claim, monetary damages are not available as a remedy under the framework set forth in *Spackman v. Board of Education,* 2000 UT 87, 16 P.3d 533. We hold that the uniform operation of laws clause of the Utah Constitution is self-executing but that under the circumstances presented in this case, monetary damages are not available.

Article I, section 24 of the Utah Constitution provides: "All laws of a general nature shall have uniform operation." Utah Const. art. I, § 24. In *Spackman,* our supreme court provided guidance for determining whether a particular constitutional clause is self-executing and whether monetary damages are an available remedy for a violation of a self-executing constitutional provision. *See* 2000 UT 87 at ¶ 1, 16 P.3d 533. The court explained that "a self-executing constitutional clause is one that can be judicially enforced without implementing legislation." *Id.* at ¶ 7.

The uniform operation of laws provision is self-executing because (1) it is presumptively "mandatory and prohibitory" under article I, section 26 of the Utah Constitution and there is nothing in the text that indicates otherwise, Utah Const. art. I, § 26 ("The provisions of this Constitution are mandatory and prohibitory, unless by

express words they are declared to be otherwise."); *see also Spackman,* 2000 UT 87 at ¶¶ 11, 15, 16 P.3d 533; (2) it has been judicially defined and enforced many times without implementing legislation, *see Spackman,* 2000 UT 87 at ¶¶ 12, 16, 16 P.3d 533; *see also Pinetree Assocs. v. Ephraim City,* 2003 UT 6, ¶ 17, 67 P.3d 462; and (3) the historical context in which the framers adopted the clause shows that they intended to constitutionalize existing concepts, like equal protection and due process, that did not require implementing legislation. *See Spackman,* 2000 UT 87 at ¶ 13, 16 P.3d 533; *Malan v. Lewis,* 693 P.2d 661, 669 (Utah 1984) (holding that the uniform operation of laws and equal protection clauses "embody the same general principle: persons similarly situated should be treated similarly, and persons in different circumstances should not be treated as if their circumstances were the same").

The Utah Constitution does not provide monetary damages for violations of constitutional provisions except for the takings clause. *See Spackman,* 2000 UT 87 at ¶ 20, 16 P.3d 533. "To ensure that damage actions are permitted only 'under appropriate circumstances,'" our supreme court has held "that a plaintiff must establish the following three elements before he or she may proceed with a private suit for damages" for a constitutional violation. *Id.* at ¶ 22 (quoting Restatement (Second) of Torts § 874A cmt. d, at 303). Accordingly, Intermountain must have alleged facts sufficient to establish the following three elements to survive UDOT's motion for judgment on the pleadings.

First, Intermountain must establish that it "suffered a 'flagrant' violation of [its] constitutional rights." *Id.* at ¶ 23 (citation omitted). Thus, Intermountain must have alleged that UDOT "violated 'clearly established' constitutional rights 'of which a reasonable person would have known.'"

Id. (citations omitted). Intermountain stated in its complaint that UDOT violated article I, section 24 of the Utah Constitution by arbitrarily and capriciously providing other businesses with direct and beneficial access to 4500 South Street and by configuring such access so as to direct traffic flow to those businesses, south of [Intermountain's property] and north and west of [Intermountain's property], while at the same time refusing to offer such accommodations to [Intermountain] who paid substantial taxes to the City and State and who relied on the City and UDOT's representations.

It is questionable whether Intermountain alleged a "flagrant" violation of its constitutional rights. We need not decide, however, as Intermountain has failed to meet the other two elements.

Second, Intermountain "must establish that existing remedies [do] not redress [its] injuries." *Spackman,* 2000 UT 87 at ¶ 24, 16 P.3d 533. This "requirement is meant to ensure that courts use their common law remedial power cautiously and in favor of existing remedies." *Id.* It is not at all clear from the allegations in the complaint that existing remedies could not have redressed Intermountain's injuries. Under the transportation regulations of the Utah Administrative Code, Intermountain should have exhausted its administrative remedies prior to seeking judicial review. *See* Utah Admin. Code R907-1-15 ("Persons must exhaust their administrative remedies in accordance with [the Administrative Procedures Act], prior to seeking judicial review."); *Patterson v. American Fork City,* 2003 UT 7, ¶ 18, 67 P.3d 466 (holding that the plaintiffs' "bald assertion that the exhaustion requirement does not apply to state constitutional claims is not persuasive").

Utah Administrative Code R907-1-3 provides for the commencement of appeals of UDOT actions by a member of the public. *See* Utah Admin. Code R907-1-3. Intermountain asserts in its complaint that in reliance on statements from UDOT officials that its "concerns would be taken into consideration," it did not "pursue action against UDOT . . . and has only now been able to determine its ascertainable damages, making its claims ripe for adjudication." However, this does not provide a legitimate reason to "relieve a party seeking judicial review of the requirement to exhaust any or all administrative remedies." Utah Code Ann. § 63-46b-14(2)(b)(i), (ii) (2003) (providing that a party may seek judicial review instead of exhausting administrative remedies only when "(i) the administrative remedies are inadequate; or (ii) exhaustion of remedies would result in irreparable harm disproportionate to the public benefit derived from requiring exhaustion"). In addition, Intermountain is not entitled to sit on its rights while it accrues damages when it had notice that other businesses allegedly received accommodations it did not, arguably in violation of the uniform operation of laws provision.

Third, Intermountain has not established that "equitable relief, such as an injunction, *was* and is wholly inadequate to protect [its] rights or redress [its] injuries." *Spackman,* 2000 UT 87 at ¶ 25, 16 P.3d 533 (emphasis added). Intermountain could have sought an injunction to enjoin UDOT's purported discriminatory actions. While the completion of the I-15 reconstruction makes equitable relief pointless today, Intermountain has not established that an injunction *was* wholly inadequate to protect its rights or redress its injuries at the time of the I-15 reconstruction. *See id.* at ¶ 24.

Accordingly, we hold that Intermountain may not proceed with a private suit for damages for UDOT's alleged violation of article I, section 24 of the Utah constitution.

CONCLUSION

We hold that the trial court did not err by dismissing Intermountain's complaint. Intermountain has failed to state a claim for inverse condemnation and it cannot demonstrate that a private suit for damages is available for UDOT's alleged violation of article I, section 24 of the Utah Constitution. Accordingly, we affirm.

WE CONCUR: JAMES Z. DAVIS and PAMELA T. GREENWOOD, Judges.

103 P.3d 716, 512 Utah Adv. Rep. 40, 2004 UT App 405

IN THE THIRD DISTRICT COURT IN AND FOR SALT LAKE COUNTY, SALT LAKE DEPARTMENT, STATE OF UTAH

INTERMOUNTAIN SPORTS, INC. Plaintiff vs. MURRAY CITY and UTAH DEPARTMENT OF TRANSPORTATION, Defendants.	**ORDER GRANTING UTAH DEPARTMENT OF TRANSPORTATION'S MOTIONS FOR JUDGMENT ON THE PLEADINGS** Civil No.: 030917322 CD Judge: William B. Bohling

On November 10, 2003, this Court heard oral argument on Defendant Utah Department of Transportation's motions for judgment on the pleadings. Joni J. Jones, Assistant Utah Attorney General, appeared on behalf of Utah Department of Transportation ("UDOT") and argued the motion to dismiss Plaintiff's claims for tortuous interferences with economic relations. Randy S. Hunter, Assistant Utah Attorney General, appeared on behalf of UDOT and argued the motion to dismiss Plaintiff's remaining claims for inverse condemnation, breach of contract, breach of the covenant of good faith and fair dealing, and violation of Article I, § 22 of the Utah Constitution (labeled "Inverse Condemnation" in the Complaint). B. Ray Zoll appeared on behalf of Plaintiff Intermountain Sports, Inc. ("Intermountain"), and argued the tort claims. John Martinez also appeared on behalf of Intermountain and argued the remaining claims.

The Court, having reviewed the briefs submitted by the parties and the case law cited therein, and having considered counsel's argument, and good cause appearing,

hereby **GRANTS UDOT'S 12 (c) MOTIONS FOR JUDGMENT ON THE PLEADINGS**, dismissing all of Intermountain's claims against UDOT with prejudice.

The Court basis its decision on the facts alleged in Intermountain's complaint and facts alleged in Intermountain's memoranda opposing UDOT's motion, as well as on the legal reasons in UDOT's memoranda, which are discussed below.

RELEVANT FACTUAL ALLEGATIONS

1. Intermountain is a recreational vehicle sales company located at 4225 South 500 West, Murray, Utah. (Compl. ¶¶ 3,8.)

2. UDOT is a State agency. (Complaint ¶5.)

3. As part of its I-15 Reconstruction Project (the "Project"), UDOT rebuilt the 4500 South interchange with I-15. During construction beginning in July 1997, off-ramps and on-ramps to and from 4500 South, and 4500 South itself, were periodically closed. (Complaint ¶¶ 10,19,21.)

4. Intermountain claims that as a result of the Project, its customers and vendors were denied reasonable access to its property, which substantially damaged its value. (Complaint ¶ 25.)

5. Intermountain also claims that other businesses along the Project, located further south, were not denied access to 4500 South and had more direct access to I-15 during construction. (Compl. ¶ 39.).

6. Intermountain alleges that UDOT negligently planned and executed the traffic flow around plaintiff's

property during construction, which interfered with its contractual relationships with customers and vendors. (Complaint ¶¶ 45, 47.)

7. According to Intermountain, UDOT represented that its I-15 access through 4500 South would be closed only one year, and that it would address Intermountain's concerns during the Project. Intermountain claims that, based on these representations, it did not sue UDOT during the Project. (Compl. ¶¶ 55-57.)

8. Intermountain has sued UDOT for inverse condemnation (Article I, Section 22 of the Constitution); denial of uniform operation of laws (Article I, Section 24 of the Utah constitution); breach of contract, breach of covenant of good faith and fair dealing, negligence, and intentional interference with economic relations.

CONCLUSIONS OF LAW

1. In determining whether Intermountain's Complaint must be dismissed under Rule 12 (c) of the Utah Rules of Civil Procedure, this Court accepts the factual allegations in the complaint as true and draws all reasonable inferences in favor of the plaintiff. *See, e.g. Arndt v. First Interstate Bank of Utah, N.A.*, 1999 UT 91¶ 2, 991 P.2d 584 (quoting *Golding v. Ashley Cent. Irr. Co.*, 793 P.2d 897, 898 (Utah 1990)). A motion for judgment on the pleadings should be granted when if, as a matter of law, the plaintiff could not recover under the facts alleged. *Id.*

2. The Court finds that under the 12 (c) standard all of Intermountain's claims are barred as a matter of law for the following reasons.

INTERMOUNTAIN'S TORT CLAIMS

3. Intermountain's tort claims are barred under the Governmental Immunity Act. (the "Immunity Act").

4. To determine whether a governmental entity is immune from suit under the Immunity Act, this Court must engage in a three-step analysis: (1) Is the activity at issue a governmental function, for which the legislature has granted blanket immunity in Utah Code Ann. § 63-30-3? (2) If so, then is blanket immunity waived in another section of the Immunity Act? (3) If blanket immunity has been waived, is there an exception to that waiver which retains immunity? *See, e.g., Pigs Gun Club, Inc. v. Sanpete County*, 2002 UT 17, ¶ 11, 42 P.3d 379.

5. Intermountain does not dispute that blanket immunity applies under the first step because it agrees that the activity at issue, reconstruction of I-15, is a governmental function.

6. Under the second step, immunity is waived for Intermountain's negligence claim under Section 63-30-10, which waives immunity "for injury proximately caused by a negligent act or omission of an employee committed within the scope of employment." Utah Code Ann. 63-30-10 (1997 & Supp. 2001).

7. Under the third step, however, immunity is retained because under § 63-30-10 immunity for negligence is waived "***except*** if the injury arises out of, in connection with, or results from . . . **interference with contract rights.**" *Id.* § 63-30-10(2) (emphasis added).

8. Because Intermountain alleges in its complaint that UDOT's negligence interfered with its contractual

relationships with vendors and customers (comp. ¶ 47), the negligence claim is barred.

9. Even if, as Intermountain argues, it sustained other injuries, such as diminution in the value of its business, that injury would nonetheless "arise out of, in connection with or result from" the interference with contractual relations. The exception under § 53-30-10(2) is broad enough to cover the additional injuries Intermountain alleges.

10. Even if Intermountain could allege some injury that was entirely unrelated to interference with its contractual relations, this Court concludes the negligence claim would still fail under the economic loss doctrine, which bars negligence claims that seek to recover only economic damages. *See, e.g., SME Industries, Inc. v. Thompson*, 2001 UT 34 ¶ 32, 28 P.3d 669.

11. The Court also concludes Intermountain's intentional interference with economic relations claims is barred under the Immunity Act.

12. Applying the three-step analysis to the intentional interference claim, the Court concludes that blanket immunity applies for the reason stated in paragraph 5, above. Under the second step, blanket immunity is not waived, because the Immunity Act does not contain a provision that waives immunity for intentional torts generally or interference with economic relations specifically.

13. The Court rejects Intermountain's argument that other provisions of the Immunity Act allow its negligence and intentional interference claims to proceed. According

to Intermountain, these tort claims can be brought pursuant to § 63-30-8 and 63-30-10.5.

14. Intermountain's tort claims cannot proceed under § 63-30-8 because immunity under that provision applies only to "a **dangerous or defective *condition*** of any highway." Utah Code Ann. § 63-30-8 (1997) (emphasis added). Intermountain has not alleged UDOT's acts resulted in a dangerous or defective condition on a highway and thus § 63-30-8 does not apply. *See also Smith v. Weber Co. Sch. Dist.*, 877 P.2d 1276, 1279 (Utah Ct. App. 1994).

15. Intermountain also cannot bring its tort claims under § 63-30-10.5, which applies when a governmental entity takes or damages private property for a public use. See Utah Code Ann. § 63-30-10.5 (1) (1997). Intermountain has alleged a claim for inverse condemnation in its First Cause of Action, and § 63-30-10.5 does not waive immunity for this claim. However, an express waiver of immunity for a government taking simply cannot be construed to include a waiver for negligence claims or intentional interference with economic relations claims.

INTERMOUNTAIN'S INVERSE CONDEMNATION CLAIM

16. Intermountain's inverse condemnation claims fails because the Utah Supreme Court has previously held that temporary denial of access to property does not constitute a taking. *See e.g., Rocky Mountain Thrift Stores, Inc. v. Salt Lake City Corp.*, 784 P.2d 459, 465 (Utah 1989) (denying inverse condemnation claim for city's interference with access to store because temporary drainage system

that interfered with access was not "permanent, continuous, or inevitably recurring").

17. This Court finds that Intermountain's allegations that UDOT's I-15 Project temporarily denied Intermountain and its customers convenient access to the freeway fails to state an inverse condemnation claim under controlling Utah case law.

INTERMOUNTAIN'S UNIFORM OPERATION OF LAWS CLAIM

18. The Court also finds that Intermountain has not stated a claim sufficient to establish that UDOT's activities during the Project amounted to a violation of the Utah Constitution's Uniform Operation of Laws provision.

19. Intermountain has not identified any law that UDOT has not applied uniformly. Nor has Intermountain alleged that UDOT discriminated against it because of its membership in an identifiable class. Intermountain has therefore failed to state a claim under Article 1, Section 24 of the Utah Constitution.

BREACH OF CONTRACT

20. The Court finds the factual allegations in Intermountain's complaint fail to state the elements of a contract claim.

21. Plaintiff has failed to plead facts sufficient to establish the existence of a contract. Notably absent are the establishment of offer, acceptance, consideration, or any terms of the agreement.

22. The Court rejects Intermountain's argument that it has stated a quasi contract claim based on promissory estoppel. The facts Intermountain has alleged are insufficient to place this case outside the general rule that promissory estoppel cannot be asserted against the government.

BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

23. Intermountain's claim for breach of the covenant of good faith and fair dealing fails because Intermountain has failed to allege facts sufficient to show it had a contract with Intermountain.

24. It is well settled that the covenant of good faith and fair dealing cannot be used to establish new rights and duties not agreed to by the parties. *See, e.g., Bethany v. Nordstrom,* 812 P.2d 49 (Utah 1991).

ORDER

Based on the foregoing, the Court **GRANTS** UDOT's motions to dismiss Intermountain's claims **WITH PREJUDICE**, the parties to bear their own costs.

DATED: 11th Dec., 2003

S/ Honorable William B. Bohling
Third District Court Judge

IN THE SUPREME COURT OF STATE OF UTAH

Intermountain Sports, Inc., a Utah Corporation,

Petitioner,

v.

Utah Department of Transportation,

Respondent.

Case No. 20041060-SC
20031029-CA

ORDER

This matter is before the court upon a Petition for Writ of Certiorari, filed on December 8, 2004.

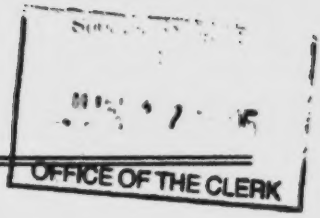
IT IS HEREBY ORDERED pursuant to Rule 45 of the Utah Rules of Appellate Procedure the Petition for Writ of Certiorari is denied.

For The Court:

Dated February 16, 2005

s/ Christine M. Durham
Chief Justice

No. 04-1551



In The
Supreme Court of the United States

INTERMOUNTAIN SPORTS, INC.,

Petitioner,

v.

UTAH DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Utah Court Of Appeals

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION

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QUESTION PRESENTED

Does this Court have jurisdiction to review the challenged decisions of Utah's courts concerning Utah law where no federal claims were either addressed by or presented to the state courts?

BRIEF FOR THE RESPONDENT IN OPPOSITION TO PETITION

Respondent Utah Department of Transportation (UDOT) submits this brief in opposition to a writ of certiorari to review the judgment of the Utah Court of Appeals in this case, *Intermountain Sports, Inc. v. Utah Dep't of Transp.*, 2004 UT App 405, 100 P.3d 716.

JURISDICTION

The Utah Supreme Court entered denial of certiorari on February 16, 2005. (Appendix to Petition at 20). The petition for a writ of certiorari was timely filed on May 13, 2005. Jurisdiction of this court is invoked under 28 U.S.C. §1257(a). However, as discussed below, the petitioner never presented a federal question for review and the courts below decided this case on purely state law grounds.

STATEMENT OF THE CASE

Intermountain Sports, Inc. (Intermountain) filed suit against UDOT in the Third Judicial District Court of the State of Utah. (Appendix to Petition at 2 and 14). In its complaint, Intermountain raised six state law causes of action.[1] (Appendix to Petition at 2-3 and 14). On appeal from the district court's dismissal of its lawsuit, Intermountain

[1] These are: 1) inverse condemnation under Utah's Constitution; 2) denial of uniform operation of laws under Utah's Constitution; 3) breach of contract; 4) breach of covenant of good faith and fair dealing; 5) negligence; and 6) intentional interference with economic relations.

raised only the two state constitutional issues. (Appendix to Petition at 2-3). The Utah Court of Appeals affirmed the district court's order, concluding that Intermountain had failed to state a cause of action for damages under Utah's Constitution. (Appendix to Petition at 1-11). In its petition for a writ of certiorari to the Utah Supreme Court, Intermountain set out the questions presented for review as follows:

> I. Did the Court of Appeals erroneously conclude that Petitioner had no protectible [sic] property right not be [sic] driven out of business by UDOT's reconstruction of I-15 under Utah Constitution Article I, §22 which prohibits taking or damaging of property by government without payment of just compensation?
>
> II. Did the Court of Appeals erroneously conclude that UDOT's procedures for appeal of adjudicatory decisions provided Petitioner with an available administrative remedy for Petitioner's Uniform Operation of Laws claim under Utah Constitution Article I, §24?
>
> III. Did the Court of Appeals erroneously conclude Petitioner had an available remedy by way of injunction for Petitioner's Uniform Operation of Laws claim under Utah Constitution Article I, §24?

Petition for Writ of Certiorari in *Intermountain Sports, Inc. v. Utah Dep't of Transp.*, Case No. 20041060-SC at 1.

Intermountain's petition for a writ of certiorari to this Court was timely filed after the Utah Supreme Court denied certiorari on February 16, 2005.

REASON FOR DENYING THE PETITION

I. This Court Lacks Jurisdiction to Review a Question Solely Based on State Law

The claims raised below by the petitioner were decided not as matters of federal law, but under the laws of the State of Utah. This Court reviews decisions based on state law only when a state's action appears to conflict with the Constitution or other federal law. 28 U.S.C. §1257(a). No such federal claim was raised by Intermountain before the Utah courts. Only state law claims were raised and decided below. The first time that any federal claim appeared was in Intermountain's petition for a writ of certiorari to this Court.

> Congress has given this Court the power to review "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . where any . . . right . . . is *specially set up or claimed* under the Constitution or the treaties or statutes of . . . the United States." 28 U.S.C. §1257(a) (emphasis added). Under that statute and its predecessors, this Court has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim "was either addressed by or properly presented to the state court that rendered the decision we have been asked to review."

Howell v. Mississippi, ___ U.S. ___, 125 S. Ct. 856, 858 (2005) (per curiam) (quoting *Adams v. Robertson*, 520 U.S. 83, 86, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) (per curiam)).

This Court is without jurisdiction to review the rulings of Utah's courts on issues of Utah law. Nor does this Court have jurisdiction to consider the federal claims raised, for the first time, in Intermountain's petition for a writ of certiorari. Petitioner never presented any federal question for review by the Utah courts. Its complaint only alleged violations of "Article I, Sections 22 and 24 of the Utah Constitution, Utah Code Ann. §§63-30-10.5 and 63-30-10," along with state law tort and contract claims. (Appendix to Petition at 2). At no time in the state courts did the petitioner raise any federal law claim or argument. No exceptional circumstances exist which would require this Court to deviate from its rule that it will not address issues raised for the first time in a petition for a writ of certiorari. *Cooper Indus., Inc. v. Aviall Serv., Inc.* ___ U.S. ___, 125 S. Ct. 577, 585 (2004) ("We ordinarily do not decide in the first instance issues not decided below. Although we have deviated from this rule in exceptional circumstances. . . .") (citation and internal quotation marks omitted).

The petitioner had the burden of showing that his federal issues were either addressed by or properly presented to the state courts below. *Adams*, 520 U.S. at 86. Intermountain's petition for a writ of certiorari fails to comply with Supreme Court Rule 14.1(g)(i)'s requirement that it specify: when the federal issues were raised below, the method and manner in which the issues were raised below, and the way in which the federal issues were passed on by the state courts. Petitioner has not met its burden. Nor could the petitioner ever meet its burden because Utah's courts were never given a fair opportunity to address the federal issues that Intermountain seeks to raise for the first time before this Court.

This Court should refuse to consider the petitioner's federal claims that have been raised for the first time in its petition for a writ of certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
JUN 30 2005
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(3)

No. 04-1551

In The

Supreme Court of the United States

INTERMOUNTAIN SPORTS, INC.,

Petitioner,

vs.

UTAH DEPARTMENT OF TRANSPORTATION,

Respondent.

On Petition For Writ Of Certiorari To The Utah Court Of Appeals

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Introduction	1
Statement of Facts	1
Argument	2
This Court has jurisdiction to review the challenged decisions of Utah's courts concerning the United States Constitution because the federal claim was properly presented to the state courts	2
Conclusion	5

TABLE OF AUTHORITIES

Page

UNITED STATES SUPREME COURT DECISIONS:

Armstrong v. United States, 364 U.S. 40, 80 S. Ct. 1563, 4 L.Ed.2d 1554 (1960) 2

Baldwin v. Reese, 541 U.S. 27, 124 S. Ct. 1347, 158 L.Ed.2d 64 (2004) 5

Howell v. Mississippi, ___ U.S. ___, 125 S. Ct. 856 (2005) 2, 3, 5

Intermountain Sports Inc. v. Utah Dept. of Transportation., Case No. 200441060-SC 2

Kelo v. City of New London, Conn., ___ S. Ct. ___, 2005 WL 1469529 1

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889 (1981) 4

CONSTITUTIONAL PROVISIONS:

United States Constitution, Amendment V 2, 4

Utah Constitution, Article I, Section 22 4

INTRODUCTION

The Petitioner has exhausted its judicial remedies in Utah seeking just compensation for the taking of its property under both state and federal constitutions. The Utah courts have had an appropriate opportunity to deal with this claim, and have failed to comply with this Court's precedent on the issue of taking private property without just compensation. Accordingly, the Court should grant certiorari.

Moreover, in light of recent adverse public opinion triggered by the Court's ruling in *Kelo v. City of New London, Conn.*, ___ S. Ct. ___, 2005 WL 1469529, whereupon the perception in the media and the public at large is that the state can now take property not only for public use, see Exhibit 1, attached, but also for private purposes, this case allows the Court an opportunity to clarify its ruling and any accompanying misperceptions. The media and general public have missed a crucial component of the ruling in *Kelo*, where just compensation is afforded a citizen. This case can set the standard of just compensation, clarify the misperception of the public, and set parameters for just compensation for legitimate economic losses.

STATEMENT OF FACTS

1. In an attempt to prevent this Court from reviewing the constitutional question presented in the Petition, the Respondent asserts that no federal claim was raised by the Petitioner before the Utah courts. This is not true, as the record indicates, the Petitioner sought relief from the Utah Supreme Court, pointing out the conflict with the United States Constitution:

> Like the analogous federal provision in the Fifth Amendment, the Utah Just Compensation Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." U.S. Const. Amend. V; *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

See Petition for Writ of Certiorari in *Intermountain Sports Inc. v. Utah Dept. of Transportation.*, Case No. 200441060-SC at 7.

ARGUMENT

This Court has jurisdiction to review the challenged decisions of Utah's courts concerning the United States Constitution because the federal claim was properly presented to the state courts.

In its brief in opposition to this petition, Respondent cites *Howell v. Mississippi*, ___ U.S. ___, 125 S. Ct. 856 (2005), to stand for the position that if a question is presented to a state court, and the claim for relief therein was based only on a state law, then this Court does not have jurisdiction to review the state supreme court's decision. The Petitioner does not contest that conclusion.

However, *Howell* supports granting certiorari. The Petitioner clearly brought to the attention of the Utah Supreme Court the conflict between precedent set by this Court and the contradicting ruling made by the Utah Court of Appeals by specifically citing to the United States Constitution and by citing to *Armstrong v. United States*, 364 U.S. 40 (1960).

In *Howell*, this Court refused to review an issue brought up for the first time on petition for certiorari. The Court justified its position:

> Petitioner's brief in the State Supreme Court did not properly present his claim as one arising under federal law. In the relevant argument, **he did not cite the Constitution or even any cases directly construing it, much less any of this Court's cases.**

Id. (emphasis added). Accordingly the Court dismissed the writ of certiorari because the question before the Court was indeed a new question that had not been dealt with by the state courts. The instant petition requests the review of a question that has been dealt with by the Utah courts.

Respondent would have the Court deny certiorari based on the fact that the federal statute was not cited in the formal question presented to the Utah Supreme Court. Such a conclusion flies in the face of the spirit and purpose of this Court's ability to review a state supreme court's decision that fails to comply with the Fifth Amendment of the Constitution of the United States and legal precedent set by this Court. This Court has said:

> Although it would avoid uncertainty and the expenditure of much time and effort if litigants identified in the state courts precisely the provisions of the Federal Constitution or the federal statute on which they rely, **we have not insisted on such inflexible specificity**. The inevitable result is that at times there have been differences of opinion as to whether the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here. At the minimum, however, there should be no doubt from the record that a claim

> under a federal statute or the Federal Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

Webb v. Webb, 451 U.S. 493, 501, 101 S. Ct. 1889, 1894 (1981) (emphasis added). This Court should not deny the Petitioner the opportunity to seek the Court's review of the Utah Supreme Court, when "the state courts have been afforded a fair opportunity to address the federal question that is sought to be presented here." *Id.*

The state provision against takings reads: "Private Property shall not be taken or damaged for public use without just compensation." Utah Const. Art. I §22. The nearly identical federal predecessor reads: " . . . [N]or shall private property be taken for public use, without just compensation." U.S. Const. Amend. V. The two provisions are virtually identical in word and effect. Under *Webb*, it would have only been duplicative, unnecessary, and time consuming to require the Petitioner to have specifically called out the federal provisions in its statements to the Utah Supreme Court.

This Court has held that citing the federal basis upon which a state claim is made is sufficient presentation of a federal claim to a lower court:

> [T]o meet this Court's standards for proper presentation of a federal claim . . . "**[a] litigant wishing to raise a federal issue can easily indicate the federal law basis for his claim in a state-court petition or brief . . . by citing in conjunction with the claim the federal source of law on which he relies or a case deciding such a claim on federal**

> **grounds**, or by simply labeling the claim 'federal.'" *Baldwin v. Reese*, 541 U.S. 27, 32, 124 S. Ct. 1347, 158 L.Ed.2d 64 (2004).

Howell, at 859 (emphasis added). In conjunction with its claim based on the state constitution, the Petitioner cited "the federal source of law on which [it] relies [and] a case deciding such a claim on federal grounds." *Id.* Under *Howell* and *Baldwin*, the Petitioner properly presented the question for which it now seeks this Court's review.

CONCLUSION

This Court has jurisdiction over this matter because the federal claim has already been presented to the Utah courts, accordingly this Court should grant certiorari. This Court is the Plaintiff's last hope in its effort to be compensated pursuant to the Constitution of the United States.

RESPECTFULLY SUBMITTED this 30th day of June, 2005.

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DESERT MORNING NEWS, WEDNESDAY, JUNE 29, 2005

EDITORIAL

WELL, IF YOU HAVE A BETTER IDEA OF WHERE TO PUT HIS NEW NAIL SALON, I'D LIKE TO HEAR IT!
DEVELOPERS
SUPREME COURT
EMINENT DOMAIN RULING